WORKING DRAFT 6-21-88

Survey of Selected Native American Settlement Claims Acts

I. Alaska Native Claims Settlement Act, 85 Stat. 688 (1971)

A. Historical Background

The United States acquired Alaska from Russia in 1867 at a cost of $7.2 million. The Treaty of Cession effectively conveyed to the United States title to all public and vacant lands in Alaska that were not individually held. The treaty provided that the "uncivilized" tribes would be subject to such laws and regulations as the United States might adopt with respect to aboriginal tribes. Native land claims started almost immediately after the sale of Alaska in 1867, the Tlingit Indians argued that they were the owners of the land. In 1884, Congress passed an Organic Act establishing a territorial government for Alaska, which provided that the Indians and other natives should not be disturbed in the possession of any lands actually in their use or occupation or then claimed by them, but that the terms under which they could acquire title to lands would be reserved for future legislation by Congress. Congress took no action. In 1935, the Tlingit and Haida Indians sued the U.S. Government to establish their aboriginal claim to lands taken from them for the creation of the Tongass National Forest. It was not until 1968 that they were awarded $7.5 million and the U.S. Court of Claims explicitly declared that the Treaty of Cession, 1867, did not extinguish aboriginal title.

The Alaska Statehood Act in 1958 did not determine the rights of the Alaska Natives. Despite the fact that

aboriginal title had never been extinguished, the state considered lands used by Alaska Natives for subsistence activities to fall within the public domain. Under the terms of the Statehood Act, the State of Alaska could withdraw approximately 124 million acres from Federal holdings in Alaska for public lands. By 1968, Alaska Natives had brought claims, based on aboriginal title, the 1867 United States-Russian Treaty, and the 1884 Alaska Organic Act, claiming ownership to 337 million of Alaska's 375 million acres. These claims prevented the State of Alaska from withdrawing the full 124 million acres of land set aside under the Alaska Statehood Act of 1958.

In 1966, Alaska Natives established a statewide organization and recomended that the Department of Interior freeze all disposals of federal land pending a land claims settlement act and argued that Alaska Natives should be consulted before the passage of any law affecting these lands.

Because the judgement obtained by the Tlingit and Haida had taken more than thirty years to decide, litigation was seen by the natives as an inadequate strategy to settle their land claims. In addition, the judgement obtained was only monetary compensation and did not return land to the natives. Thus, the idea of a legislated settlement of Native Claims was seen as a viable way to settle the natives land claims rather that face the uncertainties of litigation.

In 1968 oil was discovered at Prudhoe Bay, the oil companies aligned themselves with proponents of a legislated settlement because of the likelihood that litigation by the Natives might hold up indefinitely the granting of a right of way for the construction of a 900 mile pipeline from Prudhoe Bay to the Gulf of Alaska.

In 1971 Congress extinguished by legislation the aboriginal title held by Alaska's Natives through the passage of the Alaska Native Claims Settlement Act. This Act also extinguished the Natives' aboriginal right to hunt and fish on public lands. Through this Act the Natives received title to forty-four million acres of land, about ten percent of Alaska's territory. The federal government retained sixty percent of the land and the state government retained thirty percent of Alaska's land.

B. Nature of the Settlement relative to Land Distribution among the Alaskan Natives

The Secretary of the Interior withdrew over 100 million acres of "public lands" in Alaska. From these lands, the Natives selected a total of 44 million acres, which were divided among 220 Villages and 12 regional Corporations. The Act recognized the distinction between surface and subsurface (eg. minerals and oil) estates in land and apportioned them out seperately:

1. 200 Villages received the surface estate only to approximately 18 1/2 million acres in the areas surrounding their Villages. In addition the Villages received the surface estate to an additional 3 1/2 million acres which were divided among the Villages by the Regional Corporations.

2. The Regional Corporations received the subsurface estates in the 22 million acres patented to the Villages and the full estate (both surface and subsurface) to another 16 million acres.

3. Cemetary and historical sites were conveyed to the Regional Corporations. The surface estate in additional land was apportioned to Native groups too small to qualify as villages. This group included Natives in four towns which had originally been Native Villages but subsequently were dominated by non-natives, and individual Alaskan Natives who did not live within the village areas. The Regional Corporations received the subsurface estates in these lands.

C. Nature of the Settlement relative to Money

In total, the Alaskan Natives received $962.5 million. $462.5 million, paid over an 11 year period, came from the United States. An additional $500 million came from mineral revenues received from lands in Alaska, most of this $500 million would have otherwise been paid to the State of Alaska under then existing law.

D. Structure of the Regional Corporations

1. The Natives in each of the Native Villages were required to organize a corporation to take title to the surface estates in the land conveyed to the Village, to administer the land, and to receive and administer a portion of the money settlement.

2. The Secretary of the Interior divided the State of Alaska into 12 geographic regions composed, as far as practicable, of Natives having a common hertitage. In order to qualify for benefits under the Act, the Natives in each region were required to organize a Regional Corporation to take title to the subsurface estate in the land conveyed to

the Villages, and full title to the additional lands divided among the Regional Corporations. The Regional Corporations also received the $962.5 million settlement, to be divided on the basis of Native Population. In addition, each Regional Corporation was required to divide 70% of its mineral revenues among all of the Regional Corporations.

3. A 13th Regional Corporation consisting of Alaskan Natives residing outside of Alaska received a pro rata share of the $962.5 million, but no land.

4. Each Regional Corporation was also required to distribute not less than 50% of its share of the $962.5 million to the Village Corporations and to distribute 50% of all revenues received from the subsurface estates. Additionally, for five years, the Regional Corporations were required to distribute 10% of the revenues from the above two sources to individual Native stockholders in the Corporation. Each Native holds 100 shares in the Regional Corporation and until 1991 stock in the Regional Corporations is subject to a restriction on alienation and carries voting rights only it the holder is a Native.

E. Problems of the Settlement

1. Alaskan Natives complain that they were never consulted, there were no hearings and no votes in the villages. They have relinquished their aboriginal rights to the land and their way of life and fear eventually losing the land that has been reserved for them. ANCSA offered no guarantee in perpetuity of Native ownership of land nor did it protect Native subsistence. Because of the corporate

structure of land ownership the native owns pieces of paper or stock rather than an interest in the land.

2. Native leaders became the corporate executives of the Native Corporations, a job that they were not prepared for, therefore they had to rely on outside expertise from lawyers and consultants. The villages were not ready to implement economic development activities and enter the corporate world it was thrust upon them by congress. This resulted in a drain of their cash reserves which has resulted in some Native Corporations presently being on the verge of bankruptcy.

3. Natives born after December 18, 1971 were not allowed to share in the entitlements awarded under the Act. This provision served to segregate young and old natives and break the continuity of the native group, since it created a group of haves and have nots.

F. Current Status

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II. Maine Indian Claims Settlement Act, 94 Stat. 1785 (1980)
Passamaquoddy Tribe, Penobscot Nation, Houlton Band of Maliseet Indians.

A. Historical Background

The tribes claimed aboriginal title to 12.5 million acres of land in Maine on which approximately 350,000 private citizens resided. In 1794, the Passamaquoddy Tribe

entered into a treaty with the Commonwealth of Massachusetts (which then had jurisdiction over all of what is now Maine) in which the tribe conveyed all but 23,000 acres of its aboriginal territory. The treaty had been entered into without the participation of the federal government, despite the provisions of the federal Trade and Intercourse Act of 1790, 1 Stat. 137, which prohibited others than the federal government from acquiring land from any tribe of indians. Subsequently, sales and leases by Maine further reduced this territory to 17,000 acres. The Penobscot Nation lost most of its aboriginal territory in treaties between 1796 and 1818.

In 1972 the Tribes sued the federal government to require the federal government to bring an action against the State of Maine for the recovery of the Passamoquoddy lands alleged to have been improperly ceded in 1794. The tribes' claims basically relied on provisions of the Indian Trade and Intercourse Act forbidding conveyances of Indian land unless by treaty entered into pursuant to the constitution.

The Court of Appeals held: 1) that the Trade and Intercourse Act of 1790 included the Passamaquoddy within its terms as a "tribe," regardless of the fact that the federal government had not taken any action to "recognize" the tribe; 2) that at least insofar as the preservation of tribal lands was concerned, the Act created a trust relationship between the federal government and the tribe; and 3) that Congress had never acted to terminate this trust relationship. The Federal Government was accordingly ordered to file suit as trustee for the tribe.

After several decisions in the courts holding that the Indian Trade and Intercourse Act applied to <u>any tribe of Indians</u> and that, therefore, any land transactions with the tribes should have been made pursuant to the Act, a

settlement was reached. The controversy culminated in the passage of the Maine Indian Claims Settlement Act of 1980, P.L. 96-420, 94 Stat. 1785, which extinguished original Indian Title and provided federal funds for the purchase of lands for the three Maine tribes.

B. Nature of the Settlement relative to Money

The Federal Government enacted legislation putting $13.5 million into a trust fund for the benefit of the Passamaquoddy Tribe and another $13.5 million for the benefit of the Penobscot Nation. The fund is administered by the Secretary of the Interior but the tribes direct investment of the principal. The Secretary can refuse to follow the tribes' investment directions only if they are unreasonable. The principal of the fund is not to be distributed to the tribes, they receive income only from the investments.

B. Nature of the Settlement relative to Land

The Federal Governmment established a $54.5 million fund for the acquistion of lands for the tribes. The fund was apportioned as follows:

1. $900,000 for the Houlton Band of Maliseet Indians;
2. $26.8 million for the Passamaquoddy Tribe; and
3. $26.8 million for the Penobscot Nation.

Certain areas of the state (the areas formerly Indian aboriginal territory) were designated as areas from which settlement lands could be purchased. The first 150,000 acres bought for the Passamaquoddy Tribe and the Penobscot Nation

respectively, within the designated area, will be held in trust by the U.S. for the Tribes - this means that those lands cannot be alienated without the federal government's consent. Any susequent lands purchased will be held by the tribes in fee. Any lands acquired for the Houlton Band also will be held in trust.

C.Nature of the Settlement relative to Organizational Structure of the Tribe

Under the Settlement Act, both the Passamaquoddy Tribe and Penobscot Nation are treated as municipalities, with the power of taxation and the power to enact ordinances. The tribes have jurisdiction over tribal members with regard to tribal ordinaces, over certain criminal offenses, juvenile crimes, civil actions between tribal members, child custody proceedings, and other domestic relations matters. The tribes have exclusive jurisdiction within Indian territory to enact ordinaces regarding hunting, trapping, and fishing. The tribes are immune from suit to the same extent as other governmental entities. The Houlton Band, however, does not have the powers of a munipality due to its size.

All three tribes, as a result of court decisions and the Department of Interior's determination that they are federally recognized Indian Tribes, receive financial benefits which the United States provides to other Indian tribes. Tribal lands held in trust by the U.S. are not subject to federal taxation.

Congress <u>retroactively</u> extinguished the tribes' aboriginal title, thereby confirming all subsequent

transactions involving the lands and removing any clouds on title. Any other claims, such as claims based on trespass, were also extinguished.

III. Rhode Island Indians Claims Settlement Act, 92 Stat. 813 (1978) Narragansett Indian Tribe.

A. Historical Background

The tribe filed two suits against Rhode Island and a number of private landowners for possession of 3,200 acres of public and private land, which it claimed as part of its aboriginal territory. In 1880, these lands were alienated under the auspices of Rhode Island in violation of the Indian Trade and Intercourse Act, which forbids land conveyances by Indian tribes unless by treaty entered into pursuant to the U.S. Constitution. since alienation of the Narragansett tribal lands had not been approved by the federal government, the tribe's aboriginal title had never been extinguished. Thus, the tribe had superior title to the state and private landowners.

B. Nature of the Settlement

The State of Rhode Island enacted legislation creating a state chartered corporation with an irrevocable charter which:

1. was controlled by a board of directors, the majority of whose members would be selected by the Narragansett Indians, with other members selected by the State of Rhode Island;

2. had the authority to acquire, manage, and hold settlement lands; and

3. had the authority to establish hunting and fishing regulations on the settlement lands. All other state laws were to apply to the settlement lands.

The tribe received from the State of Rhode Island approximately 900 acres of specifically identified parcels valued at approximately $2.7 million.

The Federal Government enacted legislation which provided $3.5 million for the acquisition of approximately 900 acres of land from private individuals. The acquisition mechanism called for the Governor of Rhode Island to negotiate options to purchase with private landowners, assign the options to the Secretary of Interior who would then pay the option fees, execute the options and convey the lands to the corporation created by the State.

In the act of providing the money for acquistion of the private settlement lands, the Narragansett Indian's aboriginal title to the lands in question was extinguished <u>retroactively</u>, as of 1880, the time of the original conveyance away from thye tribe. All claims based on such title also were extinguished. Additionally, the aboriginal title to any other Indians to lands in Rhode Island were extinguished. Additionally, the aboriginal title of any other Indians to lands in Rhode Island were extinguished unless a claim was filed within 180 days of enactment of the federal legislation.